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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re D.T., a Person Coming Under the  
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.  
DIANA T.,

Defendant and Appellant.

E039385

(Super.Ct.No. SWJ4672)

OPINION

APPEAL from the Superior Court of Riverside County. Robert W. Nagby,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Maryann M. Milcetic, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Joe S. Rank, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for  
Plaintiff and Respondent.

Sharon S. Rollo, under appointment by the Court of Appeal, for Respondent  
Jeremy W.

Sharon M. Jones, under appointment by the Court of Appeal, for Minor.

Diana T., defendant and appellant (hereafter mother), appeals from the disposition order entered on a Welfare and Institutions Code section 300<sup>1</sup> petition pursuant to which the trial court removed mother's six-year-old daughter, D.T. (hereafter D.T. or the child), from mother's custody, placed the child with her father, and terminated dependency jurisdiction with so-called exit orders, awarding custody of D.T. to her father with supervised visitation with mother. Mother challenges every aspect of the dependency in this appeal. We conclude that mother's various claims are meritless. Therefore, we will affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On June 20, 2005, Riverside County Department of Public Social Services (DPSS) filed a petition alleging dependency jurisdiction under section 300, subdivision (b) with respect to then five-year-old D.T. The petition included two factual allegations – first, that mother had failed to protect D.T. from the child's adult brother, Christopher, and as a result D.T. suffered a cigarette burn on her back and a bruise on her hip, inflicted on separate occasions and, next, that mother knew or reasonably should have known that

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless indicated otherwise.

Christopher's mental health placed D.T. at risk of injury and mother failed to take the steps necessary to protect D.T. from harm.

According to the detention report, on June 15, 2005, DPSS received a report that D.T. had what appeared to be a cigarette burn on her lower back and a large dark blue bruise on her hip. D.T. said her brother Christopher had been swinging her around by the hands. She slipped out of his grasp, and was thrown against a car. D.T. stated that her brother "was 'mad.'" D.T. also said that Christopher had burned her with a cigarette. A forensic pediatrician examined D.T. and concluded the circular mark on the child's back was caused by a cigarette burn and that the burn was several weeks old. D.T. told the pediatrician that Christopher had burned her back with a cigarette through her clothes because he was mad at her.

The detention report also recounts the social worker's observation of a forensic interview with D.T. on June 17, 2005. During that interview D.T. was asked if she knew why she was being interviewed, and the child answered, "[B]ecause I have a burn from a cigarette." D.T. then lifted the back of her shirt to show the burn to the interviewer. When asked what had happened, D.T. said, "[M]y brother Chris burned me because he doesn't like me." D.T. told the interviewer that she immediately told her mother that Christopher had burned her and her mother threw away the shirt D.T. had been wearing. Mother denied knowing about the burn and said she thought the mark on D.T.'s back was from a rug burn the child must have gotten at school, during gymnastics. According to the social worker, mother said D.T. was lying when she stated that she had told her mother about the burn.

D.T.'s mother and father, Jeremy W. (hereafter father), had been involved in a custody battle over the child for several years.<sup>2</sup> The family law order in effect at the time the dependency was filed gave mother sole physical custody of D.T. and father visitation. Father is married and his wife has two sons from a previous relationship. Father and his wife have a son, Aidan, who was two years old when this dependency was filed.

In March, the social worker had responded to a report by mother that D.T. had bruises on her shins and between both eyes when the child returned after spending the preceding night with her father. The social worker and a police officer examined D.T. at mother's home. The social worker did not see any bruising between the child's eyes and concluded the bruises on the child's shins were age appropriate. When the social worker interviewed D.T., the child said, among other things, that she got the bruises on her shins from falling off her scooter. D.T. also told the social worker that she lives with her mother and sometimes her older brothers, Jimmy<sup>3</sup> and Christopher, also stay at the mother's home. When asked about her father's home D.T. said that Aidan sometimes hits her. D.T. denied otherwise being hit or spanked by anyone in either parent's home.

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<sup>2</sup> Father told the social worker that he met mother, who is 20 years older than father, when he was 16 or 17 years old. Father was close friends with one of mother's sons. According to father, mother "took advantage of him" one night when he was drunk and had been smoking dope. D.T. was four years old when father took a paternity test that established he was the child's father. Once paternity was determined, and he was ordered to pay child support, father requested visitation with D.T.

<sup>3</sup> The social worker refers to mother's other son as Jeremy and Jimmy.

In connection with the March investigation, mother told the social worker, among other things, that as a result of the custody proceeding, D.T. was in counseling. The social worker asked mother about Christopher because, when the social worker had arrived at the home, mother initially claimed she did not have time to talk because her son had “just been 5150’d and she was on her way to the hospital.” Mother said that Christopher has mental health problems that are the result of a head injury, and that earlier in the day he had broken into mother’s house while she was away, made a mess, and later “was 5150’d at a different location.” Mother denied that D.T. ever has significant contact with Christopher and also denied that her sons live at the house with her, but she could not explain D.T.’s statement that her brothers sometimes sleep at the house. The social worker advised mother of her duty to protect D.T. and warned her of the possible negative consequences of exposing the child to a person “with homicidal/suicidal ideation or drug problems.” Mother said the issue was irrelevant and that she understood her responsibilities.

As a result of the report in March, the social worker contacted father and his wife. In addition to recounting the previously noted circumstances surrounding D.T.’s conception, father acknowledged that he had used marijuana in the past and had a conviction for burglary. Father denied using corporal punishment on D.T. and claimed the child had the bruises on her shins when she arrived at his home. When asked about mother, father said he thought she was ““schizophrenic, or something,”” and although he did not have first-hand knowledge he had long suspected mother used drugs. The social

worker later contacted mother who denied drug use and after initially refusing, ultimately agreed to take a drug test. Drug test results of both mother and father were negative.

At a hearing on June 21, 2005, the trial court detained D.T., after making the pertinent findings, including the finding that the child came within the provisions of section 300, subdivision (b). The trial court, after finding that D.T. could not be protected without removing her from mother's home, continued D.T.'s placement in father's home, where DPSS had placed the child after removing her from mother's custody on June 16, 2005.

In the combined jurisdiction and disposition report, the social worker stated, among other things, that mother denied that Christopher had inflicted any of D.T.'s bruises or injuries. In addition, mother denied that Christopher was living in her home at the time D.T. was removed. Mother told the social worker that Christopher was living somewhere else but she did not know the address. Mother acknowledged that Christopher hung out at her house, but she said that she did not leave him, or her older son, Jeremy, alone with D.T. Father told the social worker that a family law order prohibited Christopher from living with mother. The social worker also reported that father's stepsons had mental health issues as a result of having been molested by the former spouse of their mother, Michelle. Michelle, in turn, reported that both boys were in counseling and had a history of sexually acting out. The social worker interviewed the 12 year old, who is the older of the two boys, and reported that despite their history, the boys "appear stable and are receiving mental health services."

In an addendum, the social worker reported, among other things, that two-year-old Aidan had thrown a toy car at D.T., and it had cut the side of the child's face. The injury required stitches. The social worker also reported a conversation with D.T.'s therapist who stated that the child seemed angry and tense, and these were behaviors the child had not previously exhibited. In the social worker's view, D.T.'s behavioral changes were attributable to her mother's efforts to alienate the child from her father.

At the combined jurisdiction and disposition hearing,<sup>4</sup> D.T. testified, in pertinent part, that when she lived with her mother, her two brothers Jeremy and Chris lived there too. D.T. denied that Christopher had burned her with a cigarette. D.T. also denied ever telling anyone that Christopher had burned her with a cigarette.

Mother testified at the hearing and stated, among other things, that D.T. had never reported that Christopher had burned her with a cigarette and mother never at any time believed that Christopher had done so. Mother said that at the time of the hearing Christopher was in a sober living facility to which he had been released after he left Set Free. Mother denied that Christopher had lived with her or spent the night at her house at any time during 2005. Mother also acknowledged that Christopher has had psychological problems in the past and twice has been committed to Charter Hospital. Mother also stated that Christopher has had a problem with alcohol in the past and once mother had Christopher arrested after he showed up at her house drunk. When asked if she would be

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<sup>4</sup> The hearing took place over four days beginning on September 19, continuing on September 20 and September 21, and concluding on October 21, 2005.

surprised to learn that Christopher had five convictions for being drunk in public, mother said she would not and added that she “had him arrested twice this year before he went into the drinking rehab.” When asked if she would be surprised to learn that Christopher had three convictions for substance abuse, mother said that she knew only of one. Mother also acknowledged that as a juvenile Christopher spent time in juvenile hall.

In addition to mother’s testimony, DPSS presented a psychiatrist’s evaluation of Christopher, dated January 5, 2005, performed under Penal Code section 1368 to determine his competence to stand trial following his arrest at mother’s home in November 2004.<sup>5</sup> During that incident, Christopher was uncooperative with the police, he was sweating profusely, and had taken an aggressive stance – holding his clenched fists waist high, with his head jutting forward and looking up at the police officers. According to the psychiatrist’s report, Christopher has a history of methamphetamine and alcohol use dating from his early teens. As an adult, Christopher has had several arrests including one for illegal possession of a pocket knife, and others for theft of beer and whiskey. Christopher acknowledged that he had spent three and one-half months in jail. He also said that when he wasn’t in jail he lives with his mother, “She don’t care if I am there.”

DPSS also presented evidence of Christopher’s criminal record which includes convictions not only for public intoxication, but also for being under the influence of a

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<sup>5</sup> The psychiatrist concluded that Christopher was competent to stand trial.

controlled substance, petty theft with a prior theft conviction, resisting arrest, and shoplifting.

At the conclusion of the jurisdiction hearing, the trial court found that D.T. came within section 300, subdivision (b).<sup>6</sup> Although the trial court stated it was basing jurisdiction on the allegation set out in paragraph b-2, it appears that the trial court made true findings on both factual allegations under section 300, subdivision (b) set out in the petition. In particular, after stating that he found the b-2 allegation to be true, the trial court stated that he did not believe the allegation that Christopher had intentionally burned D.T. with a cigarette -- “[c]hildren run into [lit] cigarettes all the time. It’s probably not a good idea for anyone to smoke around a child, but an intentionally inflicted wound as opposed to an accidental wound are two different things. There was nothing that causes the Court to show that it was an intentional cigarette burn. However, the child did have a large bruise to the child’s hip that was inflicted by Christopher, and the Court does believe the remaining portion of the allegation is true based on the evidence.” The cigarette and bruise allegations are set out in paragraph b-1 of the petition. The trial court’s discussion of the facts pertinent to those allegations indicates the court was making a finding under that paragraph.

The trial court then discussed Christopher’s criminal background and recurring mental health issues, noting among other things that Christopher had “invaded” mother’s

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<sup>6</sup> The trial court specifically referred to allegations contained in an amended petition filed September 19, 2005, that added an allegation under subdivision (c) of section 300. The trial court found that added allegation to be not true.

home, apparently referring to the incident recounted in the social worker's detention report in which Christopher purportedly broke into the house when mother was not there and messed up the place. In the trial court's view, "Christopher is a wild card." The noted facts are relevant to the allegations set out in paragraph b-2 of the petition, which alleges in pertinent part that mother knew or reasonably should have known that Christopher's mental health placed D.T. at risk of harm and that mother failed to protect her from that risk.

From the evidence that mother had allowed Christopher in her home, and did not supervise his contact with D.T. the trial court found that mother would not protect D.T. from Christopher. Accordingly, the trial court removed D.T. from mother's custody, placed her with father, and made exit orders giving father custody of D.T. and giving mother supervised visitation with the child.<sup>7</sup>

## **DISCUSSION**

### **1.**

## **JURISDICTION**

Mother challenges the trial court's jurisdiction finding, first, on the ground that the petition failed to allege facts sufficient to state a basis for jurisdiction under section 300

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<sup>7</sup> Mother requests that we take judicial notice under Evidence Code section 452 of a stipulated family court order dated October 16, 2003, that mother contends is pertinent to understanding the past custody issues in this matter. The prior custody issues are not relevant to any issue in this appeal. Therefore, mother's request for judicial notice is denied.

and next on the ground that the evidence was insufficient to support a jurisdiction finding. Both claims are meritless.

Mother did not challenge the sufficiency of the petition in the trial court. Therefore, she has waived that issue for review on appeal. But, even if we were to conclude otherwise, the purported pleading defect would require reversal only if it were prejudicial. (*In re Athena P.* (2002) 103 Cal.App.4th 617, 627.) In this context prejudice would result if the evidence presented at the hearing were insufficient to establish jurisdiction. (*Id.* at pp. 627-628.) In other words, sufficiency of the evidence is the dispositive issue and therefore the issue we will resolve.

Mother's contrary claim notwithstanding, the evidence is sufficient to support the trial court's jurisdiction finding. We review factual findings in dependency cases and all other cases under the substantial evidence standard. Therefore, our review "begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible." (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547.)

The evidence recounted above supports the trial court's jurisdiction finding under section 300, subdivision (b), paragraph b-2 of the petition which, as noted previously, alleged that mother knew or reasonably should have known that Christopher's mental health placed D.T. at risk, and that mother failed to take the steps necessary to protect D.T. from harm, thereby placing D.T. at risk of suffering injury. More particularly, the evidence shows that mother knew of Christopher's mental health issues and his ongoing

substance abuse problems. Mother admitted to twice calling the police and having Christopher arrested after he arrived at her home obviously under the influence of drugs or alcohol. In one of those incidents Christopher was aggressive toward the arresting police officers. While mother might not have actually observed Christopher commit a violent act, mother knew he had a drug and alcohol dependency problem that affected his mental state. Those facts are sufficient to support a finding that Christopher posed a risk of physical harm to D.T. and that by allowing him in her home mother was placing D.T. at risk of physical injury.

In claiming otherwise, mother does not address the above-noted evidence. Instead, she points to other evidence presented in the trial court that arguably would support a different outcome. In other words, mother apparently would have us reweigh the evidence and reach a result that favors her. Our function as an appellate court is to review the decision the trial court made and to affirm that decision if it is supported by the evidence. Simply put, we are not at liberty to reweigh the evidence and resolve conflicts therein. (*In re Dakota H.* (2005) 132 Cal.App.4th 213, 228.) Because the trial court's jurisdiction finding is supported by the evidence, we must affirm.

## **2.**

### **DISPOSITION**

Mother also challenges the disposition in this case, which removes D.T. from mother's custody. According to mother there is no clear and convincing evidence of a substantial risk of physical harm to D.T. if she were to remain in mother's care. Again, we disagree.

“Before the court may order a minor physically removed from his or her parent, it must find, by clear and convincing evidence, the minor would be at substantial risk of harm if returned home and there are no reasonable means by which the minor can be protected without removal. (§ 361, subd. (c)(1).) A removal order is proper if it is based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor if he or she remains with the parent. [Citation.]” (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, overruled on other grounds in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) Although the standard for removal under section 361 is clear and convincing evidence in the juvenile court, the appellate court reviews the juvenile court’s findings for sufficiency of evidence. (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75.) Furthermore, it is the duty of the juvenile court to determine the credibility of the witnesses. (*In re Marco S.* (1977) 73 Cal.App.3d 768, 781.)

The evidence recounted above shows that mother not only failed to protect D.T. from Christopher but she also denied that he posed a danger to the child. Consequently, the only means by which the trial court could protect D.T. was to remove the child from mother’s physical custody.<sup>8</sup> Accordingly, we conclude substantial evidence supports the trial court’s order removing D.T. from the custody of mother.

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<sup>8</sup> Mother asserts that the trial court removed D.T. from her custody in order to punish mother because she would not agree to postpone her testimony and pursue mediation. Mother’s claim is not only offensive, it simply is wrong. The record reveals that the trial court did take a break during mother’s testimony in order to explore the parties’ amenability to mediating an appropriate disposition. When mother insisted that

*[footnote continued on next page]*

Mother next claims that the trial court erred in placing D.T. with father because the child was not safe in father's home. In raising this claim mother acknowledges the preference under section 361.2, subdivision (a) for placement with a nonoffending parent unless the court finds "that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).)

Mother contends there was evidence of detriment in this case.

Here, again, we review the trial court's placement order to determine whether it is supported by substantial evidence. In challenging the sufficiency of the evidence mother cites only that evidence that supports her claim of detriment but ignores the evidence that supports the trial court's placement order. Mother at best has shown that there is conflicting evidence, but that conflict and its resolution by the trier of fact is the *raison d'être* for substantial evidence review. Simply put, the trier of fact, in this case the trial court, is charged with resolving conflicts in the evidence in order to decide the facts. On appeal, we are bound by those facts, and thus by the resolution of the underlying conflicts, if there is evidence to support them. Although stated previously, it bears repeating that our review "begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent

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[footnote continued from previous page]

she wanted to complete her testimony because she had information she needed to share with the court, the court agreed and ordered everyone to return the following day. To the extent emotion or attitude can be conveyed in a written transcript, the trial court's here seemed calm and understanding, rather than annoyed as mother claims.

and all legitimate inferences indulged in to uphold the verdict, if possible.” (*In re Katrina C.*, *supra*, 201 Cal.App.3d at p. 547.)

The evidence shows that father has shortcomings and probably is not in the running for father of the year. But the evidence does not show that he is a detriment to D.T.’s physical or emotional safety. We share mother’s concern about father’s stepsons, both of whom are reported to have mental health issues and histories of sexually acting out. But the evidence showed those issues were being addressed in counseling and that both boys were stable. The trial court apparently believed that evidence, an inference we draw from the fact the trial court placed D.T. with her father. We cannot substitute our view of the evidence for that of the trial court.

We also share mother’s concern over D.T.’s emotional state, which mother claims must be the result of trauma and distress the child is suffering in the home of father. There is no evidence of any specific event or incidents in the father’s home that would account for D.T.’s apparent emotional distress. The evidence on this issue consists of the testimony of D.T.’s therapist that the child appeared and acted very differently during several play therapy sessions that occurred after she had been removed from her mother’s custody. According to the therapist, the child seemed lost, scared and confused, where before she had been very happy and secure. D.T.’s behavior was erratic.. She would be playing nicely one minute, and the next would be violently hitting and punching toys or furniture and exhibiting what the therapist characterized as rage. After such incidents D.T. would claim that she did not know what she had just done. At the end of a session on July 20, 2005, D.T. put a small toy elephant in her “vaginal area.” The therapist took

D.T. to the bathroom where she had the child remove the toy and reassured her that she was not in trouble. After D.T. removed the toy, she told the therapist that it was warm, wet, and sticky, and she asked the therapist if the therapist wanted to feel it. The therapist testified that she told the social worker about this incident, and that everyone agreed D.T. needed to participate in structured therapy.<sup>9</sup>

The trial court heard the above-noted testimony. From the fact that the trial court placed D.T. with her father we must conclude that the trial court inferred another explanation for the child's behavior. One plausible inference is that D.T.'s behavior and apparent emotional distress were attributable to the overall situation, rather than to any specific act or omission on the part of father or his family. Because that is a reasonable inference, and the evidence otherwise supports the trial court's placement order, we must affirm that order.

Finally, mother challenges the sufficiency of the evidence to support the trial court's order terminating jurisdiction and awarding custody of D.T. to father. After placing a child with the noncustodial parent, the court may terminate jurisdiction and make final custody and visitation orders. (§§ 361.2, subd. (b)(1), 362.4.) Those so-called exit orders are then filed in any pending custody proceeding in superior court or, if there is no existing proceeding, are used to open a custody file in superior court. The custody and visitation orders remain in effect unless modified or terminated in superior court. (§

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<sup>9</sup> D.T.'s therapist had entered a doctoral program and therefore had only one more session with the child.

362.4; see also *In re Nicholas H.* (2003) 112 Cal.App.4th 251, 269.) In making custody and visitation orders, the juvenile court must focus on what is in the best interests of the child. (*In re Roger S.* (1992) 4 Cal.App.4th 25, 30-31.) On appeal, we review the trial court's custody orders for abuse of discretion. (*In re Marriage of Carlson* (1991) 229 Cal.App.3d 1330, 1337-1338.)

Mother contends, "based upon all of the evidence," that it was in D.T.'s best interest to be placed with mother rather than father. Alternatively, mother requests that we modify the provision requiring supervision of her visits with D.T. Mother does not cite any evidence to support these claims. Instead, she refers to and incorporates the evidence she relied on to support her previous arguments, all of which we rejected. We have discussed the pertinent evidence and have concluded that it supports each of the trial court's orders in this case. It also supports the final custody and supervised visitation order. The supervision requirement is necessary because mother failed to supervise D.T.'s contact with Christopher, and as a result, D.T. was injured. In short, a rational trier of fact could conclude that the trial court's orders promote D.T.'s best interests. (*In re Marriage of Carlson, supra*, 229 Cal.App.3d at p. 1337.) Therefore, we must reject mother's challenge to those orders.

**DISPOSITION**

The judgment is affirmed.

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/s/ McKinster  
J.

We concur:

/s/ Ramirez  
P.J.

/s/ Miller  
J.